

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

**THE RESEARCH FOUNDATION OF THE
STATE UNIVERSITY OF NEW YORK¹**

Employer

and

CASE 3-RC-11313

**LOCAL 1104, COMMUNICATION WORKERS
OF AMERICA, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“Board”).

Pursuant to Section 9(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ I find:

The hearing officer’s rulings were free from prejudicial error and are hereby affirmed.

The parties stipulated that The Research Foundation of the State University of New York (“Employer”) is a not-for-profit New York State corporation with offices and a principal place of business in Albany, New York, and with other facilities located in Buffalo, New York, and elsewhere throughout the State of New York, where it is engaged in the administration of

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

sponsored academic research. Annually, the Employer, in conducting its operations, derives gross revenues in excess of one million dollars, and purchases and receives at its New York facilities, goods and services valued in excess of \$50,000, directly from points outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulated, and I find, that Local 1104, Communication Workers of America, AFL-CIO ("Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 2(6) and (7), and 9(c)(1) of the Act.

The Petitioner seeks to represent all full-time and regular part-time research project assistants ("RPAs") employed by the Employer at its Buffalo, New York facilities and affiliates, excluding all confidential employees, guards, and supervisors as defined in the Act, and all other employees.

This case presents two issues. The first issue concerns whether RPAs employed at the Employer's Buffalo, New York facilities and affiliates are employees within the meaning of Section 2(3) of the Act. The Petitioner contends that *New York University*, 332 NLRB No. 111 (October 31, 2000) ("NYU"), and *Boston Medical Center Corp.*, 330 NLRB 152 (1999) ("BMC") establish that these RPAs are statutory employees. The Employer contends that these cases do not support Petitioner's assertion and that the RPAs are non-employee students who are properly excluded under *The Leland Stanford Junior University*, 214 NLRB 621 (1974) ("Stanford"), and

³ Post-hearing briefs were filed by the Employer and Petitioner and have been duly considered.

its progeny. The second issue that this case presents is whether the RPAs are temporary employees who should be excluded from the petitioned-for bargaining unit.

In Case 3-RC-11184, the Region held a representational hearing in January and February 2002, where the parties herein litigated the same issues presented herein. Case 3-RC-11184 concerned whether the Employer's RPAs at the State University of New York at Albany ("SUNY-Albany") were employees under the Act and the instant case concerns whether the Employer's RPAs at the State University of New York at Buffalo ("SUNY-Buffalo") are employees under the Act. In Case 3-RC-11184, the Regional Director issued a Decision and Direction of Election dated March 13, 2002, presently pending review before the Board, in which the Employer's RPAs at SUNY-Albany were found to be employees under Section 2(3) of the Act. As a result, given that the aforementioned evidentiary record in Case 3-RC-11184 is highly relevant to the instant litigation, and for the purposes of expediency and efficiency, the parties stipulated that the "record developed in Case 3-RC-11184, including the transcripts and exhibits, is factually similar to the record that would be developed in the instant case" and agreed "to incorporate the record in Case 3-RC-11184 into the instant record." Furthermore, the parties stipulated that the "record in Case 3-RC-11184 will be controlling in the instant case except where the parties have presented evidence that the facts of the instant case differ from those in Case 3-RC-11184, and or where the parties have stipulated to facts that are different in the instant case from the facts in Case 3-RC-11184."

Based on the parties' stipulations and the record as a whole, I find that the Employer is a non-profit educational corporation, which has been chartered by New York State law and the New York Board of Regents. The Employer promotes the educational mission of the State University of New York ("SUNY"). SUNY consists of 64 campuses that are located throughout

the State of New York. The Employer's charter articulates its relationship with SUNY with the following objective:

To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes of the State University of New York.⁴

In keeping with this objective, the Employer solicits and collects from various federal and state agencies, corporations and private foundations⁵ grant monies that are used to fund educational research. Such grants usually fund a research project for a one to four year period.

These grants are mutually advantageous to both the Employer and SUNY. The Employer benefits because up to 40 percent of all grant monies are deposited in its general coffers. SUNY benefits because its faculty members work on these grants and publish the resulting research.

SUNY, like the Employer, has a SUNY-Buffalo campus.⁶ SUNY-Buffalo is a "senior campus," which, by definition, is authorized to confer doctoral degrees.⁷

SUNY-Buffalo professors utilize the Employer to conduct certain research projects. A SUNY-Buffalo professor, who is called a principal investigator ("PI"), will initially formulate a novel research idea. The PI then identifies potential grantors who may be willing to fund the research project. The PI then drafts a grant proposal, which describes the scholarly purpose,

⁴ The Employer facilitates SUNY's ability to process research grants. The Employer exists because the State regulations which would, in the absence of the Employer's existence, control SUNY's conduct concerning grants, are too unwieldy for the administration of short-term research grants.

⁵ A sampling of grantors includes the National Science Foundation; National Inst. of Health; National Inst. of Mental Health; U. S. Dept. of Energy; Social Security Admin.; U.S Dept. of Transportation; U.S. Dept. of Justice; U.S. Dept. of Education; U.S. Dept. of Defense; U.S Dept. of Health and Human Serv.; Ford Found.; Robert Wood Johnson Found.; Rockefeller Brother Fund; N.Y. State Education Dept.; I.B.M.; and General Electric, Inc.

⁶ SUNY-Buffalo consists of a College of Arts and Sciences, the School of Architecture and Planning, the School of Dental Medicine, the Graduate School of Education, the School of Engineering and Applied Sciences, the School of Public Health and Health Professions, the School of Infomatics, the School of Law, the School of Management, the School of Medicine and Biomedical Sciences, the School of Nursing, the School of Pharmacy and Pharmaceutical Sciences, and the School of Social Work.

⁷ Total enrollment at SUNY-Buffalo is more than 25,000. Approximately 8,700 of these enrollees are pursuing graduate and professional degrees.

importance and novelty of the anticipated research project, monies required for such activity, and anticipated budget. This draft is then proffered to the Employer, who ultimately submits the grant proposal to the potential grantor under the Employer's auspices.

When a grantor accepts a research proposal, the grantor's funds are deposited in one of the Employer's accounts. The PI, in accordance with the grant proposal, then expends the deposited funds.⁸

As stated, a grant proposal contains a budget for anticipated costs, such as equipment, travel costs, materials and personnel. In addition to the PI, who enjoys ultimate responsibility, a research project generally employs additional personnel. PIs typically recruit masters and doctoral degree candidates to work on these research projects.

The RPAs at issue in this case are those SUNY-Buffalo students who are ultimately hired to work on the Employer's research projects.⁹ The Employer's *Student Titles Policy* states that RPAs must meet the following criteria:

1. The employee is enrolled as a full time SUNY student. An employee is a SUNY student during the period that begins on the first day of the first semester in which he or she is enrolled and ends with the last day of the last semester during which he or she is enrolled.
2. The employee is working part time or, if employed full time in the summer, was enrolled as a full time student during the preceding academic year.
3. The employee is engaged in work related to the student's education and training that leads to the fulfillment of academic requirements.

⁸ All solicited grants share a common objective in that they strive to add novel information to the existing knowledge base in a given field. The research projects that the Employer administers vary widely and explore new frontiers in many different fields of study.

⁹ Approximately 71 percent of these RPAs are pursuing doctoral degrees at SUNY-Buffalo.

PIs find RPAs to work on the Employer's research projects in various ways. PIs recruit RPAs at SUNY-Buffalo by posting available RPA positions, e-mailing job opportunities to students, relying on word-of-mouth, approaching students¹⁰ and relying on colleagues' leads.

A PI has complete authority to select which students the Employer hires as RPAs. Once an RPA is selected, the PI and RPA jointly complete an *Employee Assignment Form* ("EA form"), which is then submitted to the Employer's human resources office for payroll and other processing. A portion of the EA form contains personal information about the RPA, such as name, social security number, nationality, ethnic origin, visa status, veteran status and education. Another portion of the EA form includes occupational information, such as title, work hours, department and salary. The EA form also contains a "Declaration and Authorization," to be signed by the RPA, which states:

I accept the position ... as an employee of the Research Foundation.... I understand that this position is subject to final approval by the Research Foundation and is terminable at will. I have read the Patent Waiver and Release Agreement and accept it as a condition of employment. I also agree to abide by all of the policies and regulations of the Research Foundation.

An RPA position is a typically a short-term opportunity. Although some RPAs may work longer, SUNY-Buffalo RPAs are generally appointed for consecutive academic years, single academic years, semesters or summers. However, irrespective of the term of their initial appointment, many SUNY-Buffalo RPAs have their appointments renewed and remain employed by the Employer for multiple consecutive years.¹¹

SUNY-Buffalo offers more than 200 graduate and professional degree programs in subject areas that range from architecture to engineering, to law and medicine, to pharmacy and

¹⁰ The PI is often the RPA's dissertation adviser.

social work, to the many fields of study in the arts and sciences.¹² Masters degree candidates must complete the requisite number of credit hours and, in some cases, prepare a graduate research thesis.¹³ Doctoral candidates must complete the requisite number of classroom and non-classroom credit hours, pass a comprehensive examination, obtain research proficiency in their field and prepare a dissertation. A dissertation is a novel scholarly work related to the student's field of study, which typically takes multiple years to complete.

The Employer pays SUNY-Buffalo RPAs a bi-weekly stipend. Stipends at SUNY-Buffalo range from approximately \$7,800 to \$24,000 per academic year.¹⁴ RPAs frequently work on the Employer's research projects during the summer for an additional stipend. The Employer deducts federal and state income taxes from stipends, but does not deduct F.I.C.A. RPAs are granted tuition scholarships during their employment. RPAs receive health, dental, vision and prescription coverage, and a dependent care flexible-spending program.

SUNY-Buffalo RPAs are assigned diverse duties. They may collect and analyze data, draft reports and design studies within the framework of the grant and the PI's instructions. They may study a specific subject in the library for many months before actually performing their "hands-on" duties. RPAs may also perform mundane tasks such as cleaning or setting up a lab.

¹¹ The record fails to establish how frequently such reappointments occur. The record also fails to establish the average length of time that an RPA is employed by the Employer.

¹² The Employer cannot confer masters or doctoral degrees upon students.

¹³ A graduate research thesis is a scholarly paper.

¹⁴ The academic year runs from the fall through the succeeding spring.

The RPA job description describes these variations and states:

Activities will vary in terms of involvement and may be carried out in the laboratory, library, or in field studies. Activities may include assisting in the organizing and conduct of a research plan, developing methods of research, tests, and data collection, or making judgments through observation, interviews, and review of documents. Incumbents may also analyze and evaluate data, write reports or collaborate with research workers in other disciplines as required....

A SUNY-Buffalo RPA's job may have a substantial,¹⁵ limited¹⁶ or insignificant¹⁷ impact on the completion of his/her dissertation.¹⁸ The Employer and grantors unconditionally permit RPAs to use for academic purposes the research data that they work on during their employment. In some cases, an RPA may use a portion of his/her research project's data or analysis to prepare a portion of the dissertation. In other situations, RPAs may apply certain skills that they acquired

¹⁵ A SUNY-Buffalo PI, who specializes in microbiology, testified that there is a close relationship between a microbiology student's dissertation and their work as an RPA. He stated that an RPA's thesis is related to their lab work 99 percent of the time. A different SUNY-Buffalo PI, who teaches physics and presently supervises 5 RPAs, testified that 90 percent of the work that an RPA performs is related to their dissertation. One SUNY-Albany PI testified that there is sometimes a "direct connection" between an RPA's work for the Employer and his/her dissertation. However, the same SUNY-Albany PI did not testify concerning whether RPAs also perform work that is not directly connected to their dissertations, or how frequently there is a "direct connection" between an RPA's work and his/her dissertation.

¹⁶ A SUNY-Buffalo PI, who teaches mathematics and supervises 6 RPAs who are pursuing mechanical engineering and geology degrees, testified that, "research performed under a grant is incorporated, in part, into their Ph.D. dissertation and masters thesis." [Emphasis added]. Two SUNY-Buffalo RPAs, both of who were pursuing civil engineering degrees, testified that certain RPA duties bore a close relationship to their Ph.D.s, while other duties bore no relationship whatsoever. When an SUNY-Albany RPA who was pursuing a Ph.D. in chemistry was asked, "was everything that you do [as an RPA] dissertation oriented?", he responded, "[n]o, some of it is actually towards presenting various presentations for outside use. For example, for finding further funding for the program...." By way of further example, a SUNY-Albany PI who was drafting a dissertation on compounds called flavenoids, described the relationship between her dissertation and her RPA work as only "slightly" related.

¹⁷ A SUNY-Buffalo RPA, who is pursuing a Ph.D. in biochemistry, stated that he performs many tasks as an RPA that bear little or no relationship to his anticipated dissertation topic. A SUNY-Albany RPA, who is pursuing a Ph.D. in geography, testified that there is no relationship whatsoever between her dissertation and RPA duties. When a SUNY-Albany PI, who was a physics professor, was asked at the hearing whether a specific RPA's responsibilities were related to his dissertation, the PI responded, "Not very much. This is what we call community service." The same SUNY-Albany PI discussed a different RPA broom sweeping a lab in order to help with the set-up and redesign of that lab.

¹⁸ In one isolated example at SUNY-Albany, an RPA helped the PI write the grant proposal and then devoted all of her time as an RPA to working on her dissertation. The Employer presented no evidence that other RPAs did the same.

during their employment to research their dissertation. The record thus establishes that, generally, some of an RPA's work for the Employer will bear some relationship to a portion of his/her dissertation.

SUNY-Buffalo does not require masters and doctoral candidates to work for the Employer. RPAs also gain needed research experience through a variety of other venues. Students may perform paid and unpaid research duties for faculty members on projects that are not administered by the Employer, or may perform research for other employers at their facilities. The Employer does not have exclusive control of student research opportunities, as it employs only 516 RPAs out of a pool of 8,700 graduate students.

SUNY-Buffalo's doctoral candidates must maintain their status as full-time students until they complete their dissertations. This means that doctoral candidates must register for independent-study, non-classroom credits while matriculating. Doctoral students can satisfy this independent-study requirement by working for the Employer, working for other employers, conducting independent research for faculty members, conducting their own research in a library, or drafting their dissertations after their research has concluded.

PIs supervise SUNY-Buffalo RPAs by assigning them duties that are connected to the research grant. The PI generally exercises more control over RPAs when they are novices and less control as they acquire experience. The RPA job description memorializes this supervisory relationship by stating:

Incumbents perform assigned duties in scholarly or scientific investigation or inquiry or in a program of public service....

Incumbents carry out activities under the general supervision of the Principal Investigator ... in conformance with the requirements of the research grant, contract, or sponsored program....

Incumbents exercise the creativity, judgment, and discretion required for the performance of assigned duties....

Although SUNY- Buffalo RPAs are formally assigned 20 hours per workweek, the actual practice is not rigid and equates to RPAs averaging at least 20 hours per workweek. An RPA's workweek will fluctuate on the basis of the project's weekly demands. When an RPA averages more than 20 hours per workweek, he or she does not receive additional compensation.¹⁹ Although some PIs closely monitor RPA attendance, others do not and simply rely on their RPAs' weekly updates. The PI is ultimately responsible for assuring the Employer and grantor, by submitting a written report, that their RPAs have fulfilled their hourly obligations.

PIs can discharge SUNY- Buffalo RPAs at will. Such discharges do not directly affect whether SUNY-Bufferlo ultimately awards students their degrees.

The Employer also governs SUNY-Bufferlo RPA conduct with several personnel policies. These workplace policies are entitled: discrimination policy; procedure for resolving allegations of discrimination; sexual harassment policy; nondiscrimination on the basis of age policy; no harassment in the workplace policy; nondiscrimination on the basis of sexual orientation policy; procedure for solving problems in the workplace; equal employment opportunity policy; and drug-free workplace policy.

On occasion, the funding for one of the Employer's research projects may lapse before a project has been completed. This usually results in the premature discharge of the RPAs funded by the research grant. Under such circumstances, the affected RPAs may continue to work on the research project on an unpaid and voluntary basis.²⁰

ANALYSIS

¹⁹ Some RPAs work 50 or more hours per workweek for the Employer.

²⁰ This occurs when the completion of the former RPA's dissertation is closely tied to the completion of the unfunded project. The record fails to establish how frequently this scenario arises.

Section 2(3) of the Act broadly defines the term “employee” to include “any employee.” *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91-92 (1995); *NYU*, supra, 332 NLRB 111, slip op. at 1. In light of such breadth, the Board has held that:

Unless a category of workers is among the few groups specifically exempted from the Act’s coverage, the group plainly comes within the statutory definition of “employee.”

Id., citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). The Board determines whether an individual is an employee by applying the common law agency doctrine of the conventional master-servant relationship. *Town & Country*, supra, 516 U.S. at 93-95; *NYU*, supra, slip op. at 1. A master-servant relationship exists when services are performed for the master, under its control, for compensation. *Town & Country*, supra, 516 U.S. at 90-91; *NYU*, supra, slip op. at 1.

In *NYU*, the Board found that graduate students who were employed by their university as research assistants were Section 2(3) employees. *Id.* The Board initially examined Section 2(3) and concluded that the graduate students and research assistants were not expressly excluded from Section 2(3)’s definition of an employee. The Board then applied the master-servant doctrine and held that graduate students, including those who held research assistant jobs, performed services for the university under its control, for compensation and, thus, were statutory employees. *Id.* See also *BMC*, supra (holding that medical interns, residents and fellows were Section 2(3) employees, notwithstanding the fact that their employment was primarily educational).

I find that the Employer’s SUNY-Buffalo RPAs are employees within the meaning of Section 2(3) of the Act. As a threshold matter, I note that these RPAs do not fall within any categories of workers specifically exempted from the Act’s coverage. *NYU*, supra, slip op. at 2.

SUNY-Buffalo’s RPAs satisfy the master-servant test, as they perform services, under the Employer’s control, for compensation. These RPAs perform a clear service for the Employer

by working directly on research grants that keep the Employer in operation. The Employer, through the PIs, clearly controls the delivery of this service.²¹ It is undisputed that PIs direct and supervise RPAs. The RPA job description, EA form and personnel policies also memorialize the Employer's control of the RPAs. PIs must supervise RPAs because the success or failure of their RPAs' research endeavors are directly attributable to the PI, who is ultimately responsible for satisfying the grant. Moreover, if a given PI failed to monitor his/her RPAs' progress, a research project could fail or a grant could be revoked, which could potentially damage that PI's reputation and reduce his/her ability to obtain future grants. Thus, given this obvious vested interest, PIs have a strong incentive to closely monitor and control an RPA's efforts. Simply put, a PI's academic career could hinge upon such monitoring. As a result, I find that PIs clearly supervise their RPAs.

SUNY-Buffalo RPAs are compensated for their services with bi-weekly stipends, tuition waivers and an assortment of fringe benefits. The Employer deducts federal and state taxes from an RPA's wages.²²

The SUNY-Buffalo RPAs' evident "employee" status is buttressed by the fact that their work for the Employer is not a degree requirement. In this regard, Board Member Hurtgen, in his concurrence in *NYU* stated:

[I]t is undisputed that working as a graduate assistant is *not* a requirement for completing graduate education. Nor is such work a part of the curriculum. Indeed the graduate assistants have completed their course work and are preparing their dissertations while they are performing the work involved

²¹ PIs report directly to the Employer and, more importantly, to the grantors that keep the Employer in business.

²² The Internal Revenue Code treats RPA stipends as taxable compensation by providing that "[s]ubsections (a) and (d) [exempting certain compensation from gross income] shall not apply to ... payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship of qualified tuition reduction." I.R.C. § 117(c) (1994).

herein.... Thus, I regard the latter as employees who should have the right to bargain collectively.

Id., slip op. at 5. In the instant case, as in *NYU*, working for the Employer is not part of SUNY-Buffalo's curriculum and thus, not a degree-requirement. Moreover, the Employer never employs the vast majority of SUNY-Buffalo's graduate students as RPAs.²³ Accordingly, based on the Board's decision in *NYU*, *supra*, I find that SUNY Buffalo RPAs are Section 2(3) employees.

In an attempt to defeat this analysis, the Employer, in its post-hearing brief, argues that working for the Employer is a de facto, or an informal, degree requirement because such work is essential to the RPA's successful completion of his/her dissertation. The Employer notes that some former RPAs voluntarily continue to work for the Employer when a research grant prematurely expires, in order to complete certain research that will ultimately be used for their dissertation. The Employer concludes that this establishes that RPAs are truly fulfilling an educational purpose in furtherance of their dissertation when they work for the Employer, as opposed to performing a genuine service for the Employer. I find that this argument is flawed for the following reasons.

The record fails to establish whether a significant number of SUNY-Buffalo RPAs, other than a few isolated examples set forth in the record, are performing for the Employer work that duplicates their dissertations. Contrary to the Employer's assertion, the record establishes that an RPA's work for the Employer may have a substantial, limited or insignificant connection to his/her dissertation. A SUNY-Buffalo RPA's work may even bear no relationship whatsoever to

²³ As noted above, the Employer employs only about 516 of SUNY-Buffalo's 8,700 graduate students.

their dissertation. As a result, the record fails to establish that the work that an RPA performs for the Employer is a de facto degree requirement because it duplicates his/her dissertation efforts.²⁴

I also find, contrary to the Employer's assertion, that when a student's SUNY- Buffalo RPA position ends and his/her efforts continue on a voluntary basis, his/her initial employee status remains intact. The fact that someone works for a given employer and subsequently volunteers his or her services does not erase the original employee status. See *WBAI Pacifica Foundation*, 328 NLRB 1273, 1276 (1999)(holding that unpaid volunteers were not employees, while finding that their paid counterparts were). In addition, the record completely fails to establish the frequency of such volunteering.

Although a SUNY- Buffalo RPA's labors may aid his/her dissertation, the Board has held that a job's derivative educational benefits in the form of advanced training or research experience will not defeat a student's Section 2(3) status.²⁵ *NYU*, supra, slip op. at 3; *BMC*, supra, 330 NLRB at 161. As a result, I find that the mere fact that RPAs gain research experience during their employment and then apply their research acumen to perform novel work on their dissertations does not defeat their Section 2(3) status.

In spite of the Employer's assertions to the contrary, the Board's holding in *Stanford* is distinguishable from the case herein. In *Stanford*, 214 NLRB 621, supra, the Board found that research assistants were not statutory employees because they failed to provide a service to their

²⁴ The flaw in the Employer's argument is highlighted by a record that almost completely fails to identify, beyond some generalities, the projects and tasks that RPAs perform for the Employer; the RPAs' dissertation topics and how, if at all, the RPAs' work duplicates their dissertations. The record paints a general picture of RPAs who perform work which varies at any given time from being closely tied to, somewhat related to, or completely unrelated to their dissertations. The record also fails to show that, as a policy matter, all RPA work duplicates their dissertations. While this problem was noted in the Decision and Direction of Election in Case 3-RC-11184, it was not remedied in the instant case.

²⁵ One SUNY-Albany PI in physics described an RPA using some of the data from a project for his/her dissertation as "just incidental that it becomes the thesis."

purported employer. The Board found that monies earned by the research assistants therein was merely a type of financial aid to permit them to pursue their degrees, rather than amounts based upon the nature of the research they were pursuing or their individual skills or function. The research assistants who received other forms of financial aid from Stanford received decreased financial support for research. Because the Board found no correlation between the work performed and the monies received, nor a correlation between the stipend and the number of hours worked, and in the absence of fringe benefits received by other employees, the Board found the research assistants to be primarily students, rather than employees. As the Board subsequently stated, in *Cedars-Sinai Medical Center*, 223 NLRB 251, 255 n. 14 (1976), concerning its decision in *Stanford*,

In terms of the actual research conducted, Stanford was, essentially, a disinterested party. Stanford did not control the research, did not request the research, and, most significantly, did not receive remuneration from a third party for the particular research.

Stanford is clearly distinguishable herein, as the Employer is not a disinterested party, as it controls the RPAs' research and related work, initiates the research with a grant proposal, and receives grant monies directly from the grantor. Likewise, given that an RPA's tenure may end after an academic year, while a research grant typically ends after multiple years, one would be hard-pressed to assert that the Employer is a disinterested party to the RPA's employment relationship. Such interest is also evident by the Employer's insistence that the RPAs sign a patent waiver and release. If an RPA's research while working for the Employer is of economic value, the Employer receives the full benefit.

Contrary to the Employer's position, the Board's holding in *NYU* does not require a finding that RPAs are not employees. In *NYU*, while the Board held that the vast majority of the

graduate students were statutory employees, the Board excluded a small contingent of student workers as follows:

For the reasons set forth by the Regional Director, we agree that the Sackler graduate assistants and the few science department research assistants funded by the external grants are properly excluded from the unit. *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974). The evidence fails to establish that the research assistants perform a service for the Employer, and, therefore, they are not employees as defined in Section 2(3) of the Act.

Id. at 4 n. 10. The student workers excluded by the Board in *NYU* were not required to commit a minimum number of hours to the university or perform specific tasks, and their research duplicated their dissertations. *Id.* In contrast, the RPAs at SUNY-Buffalo commit a minimum of 20 hours per week to work, perform specific tasks under their PI's direction and perform work that generally does not duplicate their dissertations.²⁶

As a further matter, even assuming *arguendo* that the record establishes that SUNY-Buffalo RPAs in certain academic fields exclusively perform work that duplicates their dissertations, which it does not, I would still *not* exclude those RPAs as students under *NYU* because these hypothetical RPAs, unlike the excluded *NYU* RPAs, would at best, still only satisfy one element of the three-part *NYU* exclusion test. Specifically, they remain obligated to work a minimum number of weekly hours *and* still perform their work under a PI's supervision. As a result, they remain employees under the Act.

The Employer also argues that SUNY-Buffalo RPAs cannot be Section 2(3) employees because they receive academic credit during their employment. However, the Board has held

²⁶ While an RPA generally works for the Employer for an academic year, his/her dissertation generally takes multiple years to complete. Thus, while there may be some duplication or correlation between work performed as an RPA and that performed for a thesis, it does not appear from the evidence presented that an RPA's work is identical in scope, duration and content to his/her dissertation.

that medical residents who received academic credit for their work nevertheless remained Section 2(3) employees. *BMC*, supra. As a result, I find that SUNY-Buffalo's conference of academic credit on the RPAs does not alter their status as Section 2(3) employees.

The Employer also argues that the SUNY-Buffalo RPAs should be excluded because they are temporary employees. With respect to temporary employees, the Board has held:

It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit and that an employee's eligibility status is determined by his status as of the payroll eligibility date The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain [The] "date certain" eligibility test for temporary employees ... does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992) citing *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982). However, in the area of graduate education, the Board has been unwilling to exclude student-employees as temporary workers, even though their tenure is uncertain in the sense that such student-employees eventually graduate and terminate their employment. Although the Board has noted that various individuals in different occupations have jobs which are for durations as short as one to two years, it has refused to extend the definition of "temporary employee" to such individuals. *BMC*, supra, 330 NLRB at 166. As a result, the Board has held that graduate students should not be excluded as temporary employees under the Act. *NYU*, supra, 332 NLRB No. 111, slip op. at 13-14, n. 43. The Board has also held that medical residents, who eventually complete their short-term residencies and terminate their employment, are not temporary employees. *BMC*, supra, 330 NLRB at 166. Thus, given that the RPAs herein are virtually indistinguishable from *NYU*'s graduate students and *BMC*'s medical residents, I find that the SUNY-Buffalo RPAs are not temporary employees.

Based on the foregoing, I find that RPAs at SUNY-Buffalo are employees within the meaning of Section 2(3) of the Act.

APPROPRIATE UNIT

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time research project assistants employed by the Employer at its Buffalo, New York facilities and affiliates; excluding all confidential employees, guards, and supervisors as defined in the Act, and all other employees.

There are approximately 516 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not

they desire to be represented for collective bargaining purposes by **Local 1104, Communication Workers of America, AFL-CIO.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Acting Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the Albany Resident Office, Room 342, Leo W. O'Brien Federal Building, Clinton Avenue and North Pearl Street, Albany, New York 12207 on or before **April 18, 2003**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by April 25, 2003.

DATED at Buffalo, New York this 11th day of April, 2003.

CHARLES J. DONNER,
Acting Regional Director
National Labor Relations Board – Region 3
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, New York 14202

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